United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by Jay H. Topkis

75 7071

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

- x

AMERICAN METAL CLIMAX, INC.,

Plaintiff-Appellee, Docket No. 75-7071

-against-

ESSEX INTERNATIONAL, INC.,

Defendant-Appellant.

- x

BRIEF OF PLAINTIFF-APPELLEE

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
Attorneys for Plaintiff-Appellee
345 Park Avenue
New York, New York 10022

Jay H. Topkis
Doris Carroll

Of Counsel

TABLE OF ABBREVIATIONS

a: Refers to the indicated page in Volume I of the Joint Appendix.

E: Refers to the indicated page of Volume II (Exhibits) of the Joint Appendix.

Tr: Refers to the indicated page of the original trial transcript.

TABLE OF CONTENTS

Table of Contents - Continued

TABLE OF AUTHORITIES

Cases: Page

Table of Authorities - Continued

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

AMERICAN METAL CLIMAX, INC., :

Plaintiff-Appellee, : Docket No.

-against- : 75-7071

ESSEX INTERNATIONAL, INC., :

Defendant-Appellant. :

- x

BRIEF OF PLAINTIFF-APPELLEE

Preliminary Statement

Defendant-appellant in this diversity action, Essex International, Inc.* ("Essex), appeals from an order and final judgment entered December 20, 1974, by the District Court for the Southern District of New York (Motley, J.), after trial to the court, which awarded breach of contract damages to plaintiff-appellee American Metal Climax, Inc. ("Amax"), in a total amount of $4.6 million.

Essex's primary contention on appeal is that the lower court's damage award for Amax's lost profits

---

* We should perhaps note that, on February 4, 1974, Essex International, Inc., was merged into United Aircraft Corporation as a wholly owned subsidiary.

in the amount of $4.1 million "is not supported by credible evidence." Thus, Essex squarely challenges the court's finding that Amax's proof of its lost profits "presented a credible and rational basis from which prospective profits could be gauged" (146a-147a).

Essex's subsidiary contention, argued late in its brief, is that it did not breach the contracts at all: Essex claims that it was justified in repudiating the agreements between the parties because Amax had breached. Again the lower court's findings are to the contrary: it was not Amax that breached, said the court; rather, "the preponderance of the credible evidence establishes that Essex failed to make a good faith effort" to perform its obligations (139a).

As the court below notes, the proof at trial established that Essex had the most basic economic reason for repudiating its agreements with Amax. This was not any belief that the Properzi machine could not be brought up to specifications (the ground upon which Essex origirally based its attempted contract cancellation), nor any lack of diligence on Amax's part in providing maintenance services

(a ground advanced by Essex years later, during this litigation). Rather, as the court below found, the simple fact was that, by March 1968, Essex was over-committed for the purchase of Properzi rod. "At a time when Essex forecast a need of no more than 22 million pounds of rod, annually, it was obligated to buy 18 million pounds from Amax annually and, additionally, 22 to 50 million pounds of aluminum annually from Alcoa" which Essex would itself convert into rod (137a). Amax was the more costly supplier (134a). And so for Essex the course of economic logic was obvious: break the deal with Amax. In May 1968, the court found, Essex fabricated a pretext and reneged. Without warning, without discussion, and without justification, Essex renounced its obligations to Amax.

Essex apparently hoped that Amax would not sue. It learned otherwise. We ask affirmance of the judgment which resulted from that suit.

Issues Presented

1. Was the court below correct in finding that Essex breached the Properzi agreements?

2. Was the court below correct in finding that Amax proved its damages by credible and rational evidence?

3. Was the court below correct in holding that Amax is entitled to judgment on Count III of its complaint based on the settlement agreement of July 25, 1968?

Statement of the Case

Because defendant's statement of the case omits significant facts, it would seem appropriate for us to set forth in brief form the evidence which was adduced at this trial.

Amax, Essex and the Properzi

Plaintiff Amax is a company engaged in the aluminum business, and particularly engaged in the basic process -- "reducing" or smelting the raw material, aluminum oxide, into molten primary aluminum on pot lines in a reduction plant. The molten aluminum thus produced may be cast into T-ingot, the simplest product, or it may be cast, extruded or rolled into more complex forms (156a-158a).

Amax's primary aluminum is produced at the Ferndale, Washington, reduction plant of the Intalco Aluminum Corporation ("Intalco"), a company of which Amax is a 50 per cent owner, receiving 50 per cent of all the aluminum Intalco produces. Intalco's Ferndale facility is the largest and most modern aluminum reduction plant in the United States (19a, 157a, 162a, 240a, 262a).

S.p.a. Continuus ("Continuus") is an Italian firm which makes, in various sizes, a machine for the continuous casting and rolling of molten primary aluminum into the 3/8" aluminum rod from which wire is fabricated. The machine, named after its designer, is called a "Properzi." Properzis manufactured by Continuus have long been in operation in the United States. In 1966, Continuus announced the development of its newest and largest design, the Model 8, warranted to produce 14,000 pounds of aluminum rod per hour. Model 8's were immediately ordered by Alcoa and General Cable for delivery to the United States (18a, 413a-414a, 529a, 548a, 552a).

Defendant Essex is in the business, inter alia, of manufacturing wire, cable and related products from primary aluminum. Essex has never had an interest in the basic smelting or reduction process: It owns no pot line nor any interest in one. Essex does, however, have a history of involvement with Properzi machines. It owned and operated a Model 5 Properzi from 1953 to 1957, and the man who ran the machine, Charles Kilburn, has been with Essex ever since (404a-405a, 413a-414a).

The Joint Pot Line Proposal
and the Properzi Agreements

In 1966, in the course of talks with Amax about a possible joint pot line venture, Essex's president, O'Malley, had another idea: Essex had ordered a Model 8 Properzi in the spring of 1966. Essex had planned to install its Model 8 at the aluminum fabrication plant it was then building in Paducah, Kentucky. It occurred to O'Malley that he might increase his chances of making a pot line deal with Amax if he were to offer Amax an interest in the new Properzi, and have the machine installed at the new Intalco reduction plant in Ferndale, Washington (406a-407a).

O'Malley consulted members of his staff, Dunstan and Publow, about the idea. All three testified that, as a matter of dollars and cents, the Properzi deal with Amax made no sense for Essex. The basic reason was simple geography: Amax's Intalco plant was in the farthest northwest corner of the United States. If the Properzi were put there, Essex would

have to pay substantial freight charges to ship rod to its fabrication plants in the Midwest. It would be far cheaper for Essex to put the new Properzi in Paducah, buy molten metal for it from the nearby Alcoa reduction plant at Warrick, Indiana, and virtually eliminate freight costs (407a-408a, 336a-337a, 517a-522a, 5E).

But O'Malley deliberately chose to ignore the figures. He wanted to ingratiate himself with Amax. Therefore, in about August 1966, Essex and Amax agreed that Essex would lease its Model 8 Properzi to Amax at a nominal rent and would install it at the Intalco plant in Washington, where Amax would produce Properzi rod for sale to Essex and any other customers it could develop, and for its own use (407a, 19a, 213E).

Two formal written contracts dated December 14, 1966, set out the terms of the agreements with respect to the Properzi -- the "bailment lease agreement" and the "supply contract." Both were to run until December 31, 1973 (157E, 162E).

The Bailment Lease Agreement

Under the bailment lease agreement (157E), Essex leased the Properzi to Amax for $10 yearly. Amax was to pay no additional rent or royalty for manufacture of rod for sale to Essex. But at any time that the machine was not producing rod for Essex, Amax could produce rod for its own use or for sale to others -- paying Essex a royalty of 1/4¢ per pound for rod produced for Amax's own use, and 3/8¢ per pound for rod sold to others.

Under paragraph 3 of the bailment lease agreement, Essex had these duties (159E):

> "Essex will install the Properzi at the location at said Ferndale, Washington plant designated by Amax in consultation with Amax. After installation, Essex will provide adequate training at Ferndale in the operation of the Properzi for the original crew of personnel, who will operate the Properzi. Essex will be responsible for the original running in of the Properzi and Amax' responsibility, under the rod bar stock Purchase and Sale Agreement between the parties of even date herewith, for the delivery of bar stock will not start until the Properzi is fully installed by Essex and operating normally. Throughout the life of this lease Essex shall be obligated to give Amax, or its designee, all the technical assistance needed to run said Properzi. Should the Properzi fail to live up to specifications, Essex promptly will fix or remove the Properzi and restore the site."

Paragraph 4 of the bailment lease agreement read (159E):

> "From the completion of the installation of the Properzi, expected on or before March 31, 1967, and its running in subsequent to that date, Amax shall be responsible for the day-to-day maintenance of the Properzi, making repairs as necessary for its preservation, subject to ordinary wear and tear."

The parties carefully specified the only conditions under which Essex had the right to remove the Properzi from Intalco. Paragraph 7(d) of the bailment lease agreement provides (160E):

> "Amax agrees as follows:
>
> * * *
>
> "(d) to permit Essex to enter the Ferndale plant and take possession of the Properzi and remove it in the event of any breach by Amax of any of its agreements herein, or, if during the period of this lease or any extension thereof, bankruptcy or insolvency proceedings are commenced by or against Amax or Intalco, if a receiver is appointed to take possession of the business of Amax or Intalco, or if Amax or Intalco discontinue business on the premises."

The Supply Contract

The supply contract (162E) provided that Essex would purchase rod from Amax at 23.86 cents per pound

F.O.B. Intalco, based on a published aluminum ingot "book price" of 24.5 cents per pound. The contract price for rod was to vary upward or downward by the amount that the book price of ingot might vary from time to time.

Essex was obligated to purchase and Amax to supply at least 15 million pounds of rod in 1967 and 18 million pounds annually from 1968 through 1973 (163E). (Thus, since the Model 8 had the capacity to produce 50 million pounds a year or more [193a], Amax could look forward to having a good supply of rod to sell or use.)

"Significantly, with respect to the commencement of Amax's obligations," Judge Motley noted (133a), the supply contract provided:

> "Amax shall have no obligation under this Agreement until the Properzi facilities covered by the Bailment Lease between the parties of even date herewith have been fully installed by Essex and are operating normally" (165E).

The supply contract makes careful and explicit provision as to the duties of the parties should "failure

of the Properzi . . . to function properly . . . interfere with production" (165E-166E):

> "Should any cause beyond the control of either of the parties hereto including . . . failure of the Properzi rod processing and related equipment . . . to function properly . . . interfere with production, deliveries under this Agreement shall be suspended at the instance of the party suffering the disability during the period of such condition or the period necessary to remove such cause."*

Essex's Second Model 8 Properzi and the Essex-Alcoa Contract

In May 1967, before the first Model 8 Properzi had arrived at Intalco, Essex ordered a second Model 8 for installation in 1968 at its plant in Paducah, Kentucky (24a, 57E).

By contract dated December 26, 1967, Essex arranged to obtain molten aluminum for this second Properzi from the Alcoa reduction plant in nearby

---

* Defendant's brief paraphrases this provision by saying:

"[N]either party had obligations under the Supply Contract if failure of the Properzi rod processing and related equipment . . . to function properly . . . interfered with production " (Def. Brief, p. 5).

The paraphrase hardly does justice to the plain language: the agreement did not provide that "obligations" should end, only that "deliveries" were to be "suspended" until the problem was cured.

Warrick, Indiana: Essex agreed to buy 22 million pounds in each year from 1969 through 1983. The cost to Essex of making rod from Alcoa aluminum was well below the cost of Amax rod, principally because of the freight differential (104E, 4E, 518a-522a).

The Amax-Okonite Supply Contract

In December 1967, exercising its right under the agreement with Essex, Amax contracted to supply the entire Properzi rod requirements of The Okonite Company during the years 1968 through 1972. In the contract, Okonite estimated its requirements during the five years at 120 million pounds, and reserved the right to call for an additional 120 million pounds. The price was to be 26.8 cents per pound, based on an ingot book price of 25.0 cents, with the contract price for rod varying with the published price of ingot (224E).

Installation of the Properzi at Intalco

Delivery and installation of the Properzi at Intalco, forecast for March 1967, was delayed until November through no fault of either Amax or Essex (22a, 23a).

Thereafter, from November 1967 until May 1968, Intalco personnel worked under the supervision of Charles Kilburn -- the Essex supervisor who had had previous experience with Properzis -- to de-bug the new machine and bring it to normal operation. They were assisted at times by experts from Continuus and Nichols, the American representative of the Italian company (441a-443a 57E-59E).

Kilburn and the Intalco crew encountered problems in trying to bring the Properzi up to its rated production of 14,000 pounds of rod per hour (318a-326a, 421a-422a). These problems were not atypical: all three Model 8's then installed in the United States experienced difficulties with the copper ring mold and the pouring spout, and the secondary cooling system as originally designed has never been used on any Model 8. But Alcoa and General Cable succeeded in mastering the problems fairly soon; their machines were performing up to specifications by February 1968 (535a-536a, 544a-548a, 552a-558a, 565a-566a, 569a-572a).

In early 1968, when the running in of the Properzi at Intalco was taking longer than had been

anticipated, Amax and Essex had discussions as to when the Properzi would be considered "operating normally," so that, under the bailment lease, responsibility for maintenance and operation would shift from Essex to Amax. By an exchange of letters dated January 22 and February 8, 1968, the parties agreed that the Properzi would be considered operating normally and would become the responsibility of Amax when it had operated for two weeks at an average production of 12,600 pounds per operating hour and had produced in the two weeks at least 750,000 pounds of acceptable rod, with a production crew of no more than six people per shift (241a-243a, 13E-15E, 17E, Exh. D-141).

From November 1967 through May 1968, the quantity of rod produced steadily increased, and for a short time production averaged 11,000 pounds per hour, but production at Intalco never reached the level at which the parties had agreed the Properzi would be "operating normally" (68E-103E, 454a).

Abandonment of the Proposed Pot-Line Venture and Essex's Overcommitment for Rod

By March 1968, the possible Amax-Essex jointly-owned reduction plant was moribund. As Amax vice-president Kaufmann said of a telephone conversation he had with Essex vice-president Dunstan on about March 13, 1968 (203E):

> "As for planning O'Malley's trips to Newfoundland [to view a possible joint pot-line site], I emphasized that the timing couldn't be worse. I said when asked I had told Amax officials that our experience with Essex over the year had shown that on the technical front the Properzi machine was a year late and not yet working properly, that on the commercial front Essex had gotten out of their contract commitments in 1967 claiming no legal or moral obligation, and during 1968 asking for better terms, and that finally on the financial front Essex is yet to pay Amax any money owed, and have cavilled over every charge. He got the message."

As of January 1968, moreover, Essex forecast that it would need no more than 22 million pounds of rod annually (137E). (Actually, in 1968 Essex used only 17.6 million pounds [141E].) But Essex was contractually obligated to buy 18 million pounds from Amax annually, and in addition, was committed to buy 22 to 50 million

pounds of aluminum yearly from Alcoa for the second Properzi at Paducah -- which had a capacity to produce up to 60 million pounds of rod per year (162E, 104E, 387a-388a).

In this bind, Essex determined to get out of its contractual obligations to Amax. The ground used would be a claim that the Model 8 could not be brought up to specifications, and would have to be removed (38E).

Essex decided on this course although it had a most reasonable proposal from Nichols, the American representative of Properzi: On May 2, 1968, Nichols offered to send in its own men and bring the Intalco Properzi up to the standards of normal operation set by the parties -- within four weeks. The total cost to Essex would be not more than $16,000, to be paid only if Nichols were successful (33E). But Essex rejected this risk-free proposal out of hand (537a-538a).

Essex Terminates the Properzi Agreements

By registered letter dated May 10, 1968, Essex gave notice to Amax that it had determined to remove the

Properzi from Intalco, asserting that the machine had failed to live up to specifications. Essex said further that removal of the Properzi would terminate the supply contract between the parties (38E). In view of Essex's position in this litigation, it is noteworthy that, neither in this letter nor any other, did Essex claim any failure on the part of Amax or Intalco personnel to supply necessary maintenance services.

In letters dated May 17 and May 29, 1968, Amax rejected the Essex claims (41E, 47E). In the May 29 letter, Amax gave notice:

> "Amax will hold Essex responsible for its loss of profits, its damages from being forced to acquire redraw [rod] under other arrangements in order to fulfill its commitments and all other loss and damage resulting from Essex not performing both the Bailment Lease Agreement and the Aluminum Purchase Agreement dated December 14, 1966. Essex has no right to remove the Properzi and Amax will hold Essex responsible for the consequences of such removal and the refusal of Essex to put the Properzi into operation promptly." (47E-48E.)

In June 1968 there were tentative settlement discussions between Amax and Essex turning on the possibility of Amax buying the Properzi, but the discussions were

inconclusive (166a-167a). Amax consulted counsel in Washington as to whether it should attempt to prevent removal of the Properzi, and was advised not to interfere (168a, Tr. 743-744).*

Having decided to remove the Intalco Properzi, Essex took steps to cancel its order for a second Model 8. On June 7, it wrote to Nichols complaining of the Intalco Properzi. But Essex did not ask that Continuus take back the machine. Instead, Essex only put Nichols on notice that it might not accept the second Properzi, scheduled for shipment in July (2E). Indeed, at no time did Essex ever contemplate abandoning the use of a Model 8 Properzi; its decision was only to reduce its Properzi involvement from two machines to one (387a). And of course it made economic sense for that one to be in the Midwest rather than the far Northwest.

On June 24, 1968, Essex began to dismantle and remove the Intalco Properzi (479a-480a). Essex stored

---

* As Judge Motley observed (140a), it is a general proposition recognized in the State of Washington, as elsewhere, that damages are the usual remedy for breach of contract, see Williams Tilt-up Contractors v. Schmid, 326 P.2d 41 (Sup. Ct. Wash. 1958).

the Properzi temporarily, and then installed it at a new Essex plant in Boonville, Indiana, near Alcoa's Warrick reduction plant. Installation at Boonville began in March 1969, and the machine was operating satisfactorily by April 1969 -- Essex having made some minor design modifications with Nichols' help (481a-483a, 488a-490a). That Properzi -- which Essex removed from Intalco on the excuse that it could not be made to work -- is still in operation at Essex's Indiana facility, producing rod at the rate of 14,000 pounds per hour (462a-463a).

Damages Suffered by Amax through Essex's Termination of the Properzi Agreements

Essex's removal of the Properzi from Intalco in June 1968 made it impossible for Amax to produce Properzi rod. Since the Properzi had a rated capacity of over 60 million pounds of rod a year (193a), or 360 million pounds over the life of the bailment lease contract, Amax was thus denied the opportunity to sell up to 360 million pounds of Properzi rod in the period 1968-1973. In fact, at the time that Essex repudiated its agreements, Amax had firm contracts for rod sales

to two customers: Okonite had agreed to buy at least 120 million pounds during 1968-1972 (225E); and Essex had contracted to take at least 108 million pounds during 1968-1973, 2.1 million of which had already been shipped (163E, 181a).

At trial, Amax proved that its lost profits on those contracted-for sales alone amounted to $4,090,140 (181a-186a, 155E). The basis of its proof, which Judge Motley characterized as "credible and rational," is set forth in detail at pages 36-52 of this brief.

A R G U M E N T

I

THE COURT PROPERLY FOUND THAT ESSEX BREACHED.

In its letter giving notice of its intent to remove the Properzi, Essex said that the Model 8 had failed to live up to specifications and would be removed "pursuant to the last sentence of paragraph 3 of the Bailment Lease Agreement" (38E).

But paragraph 3 was no escape hatch. It put a burden on Essex if the Properzi failed to live up to specifications -- to fix the machine or remove it and restore the site. The paragraph gave Essex no unilateral right to pull the machine out solely because Essex was not satisfied with its performance, without regard to Amax's rights and expectations. Rather, paragraph 3 gives protection to Amax: it gives Amax the option of requiring Essex to fix the machine or to remove it. If Essex was dissatisfied with the performance of the Properzi, Essex had its own remedy -- a suit against Continuus and Nichols on their warranties.

On this appeal, Essex does not mention paragraph 3. Rather, it offers a justification for its removal of the Properzi heard for the first time at the trial: Essex contends that it fulfilled its duty of "running in" the Properzi even though the machine did not reach the point of normal operation, that responsibility for day-to-day maintenance thereupon shifted from Essex to Amax, and that "Judge Motley found that Amax refused to assume the responsibility for maintenance" (Def. Brief, p. 39). Therefore, Essex was privileged to remove the machine since it was Amax which was in breach.

These contentions have no foundation in the record here. It is the sheerest fantasy to suggest that Judge Motley "found that Amax refused to assume the responsibility for maintenance." Rather, she found that the responsibility never shifted to Amax because Essex never made a good faith effort to bring the machine to the point where Amax would become responsible. In consequence, Judge Motley had no occasion to determine whether Amax had properly discharged the duty which was never cast upon it. Essex breached by failing in its obligation, and there the matter ended.

There is no ambiguity in Judge Motley's decision. After hearing all of the witnesses in a five-day trial, here is what she said:

> " . . . under all the circumstances, including the usual difficulties encountered when dealing with a special machine of which the court takes judicial notice, the preponderance of the credible evidence establishes that Essex failed to make a good faith effort to bring the Properzi machine up to specification while located at Intalco in violation of paragraphs three and four of the bailment lease agreement."
>
> "The court also concludes that a fair reading of the bailment lease agreement is the one suggested by Amax. That is, the parties intended a continuous sequence of responsibility for maintenance and that the running-in period would only be completed when the machine came up to normal operation and, normal operation having failed, the responsibility for maintenance remained with Essex. Therefore, contrary to Essex's claim, Amax did not violate its obligations under the bailment lease agreement by refusing to assume the responsibility for maintenance. Essex, therefore, was not justified in removing the machine under 7(d) of said agreement. Such removal by Essex constituted a breach of the bailment lease agreement and an anticipated repudiation of the supply contract." (139a.)

This should perhaps end the discussion. For these are, of course, issues of fact, and the court's

findings are scarcely clearly erroneous. F.R.C.P. 52(a). But the judgment appealed from is substantial, and so it is perhaps appropriate to demonstrate in further detail the untenability of defendant's position that its obligation ended before the machine was brought to the point of normal operation.

Paragraphs 3 and 4 of the lease agreement provide in pertinent part (159E):

> "Essex will be responsible for the original running in of the Properzi and Amax' responsibility, under the rod bar stock Purchase and Sale Agreement between the parties of even date herewith, for the delivery of bar stock will not start until the Properzi is fully installed by Essex and operating normally. . . .
>
> "From the completion of the installation of the Properzi, expected on or before March 31, 1967, and its running in subsequent to that date, Amax shall be responsible for the day-to-day maintenance of the Properzi, making repairs as necessary for its preservation, subject to ordinary wear and tear."

As a matter of plain language, we submit, this means that Essex had to run in the machine until it was operating normally, and only then did Amax become obligated to make deliveries of rod and bear the expense of day-to-day maintenance. Running in ends when normal operation begins.

Essex, however, would interpret the term "running in" in strained fashion, in order to trigger the shift of maintenance responsibility which is essential to its theory of a material breach by Amax. Essex contends that the process of running in was complete by November 1967 when the first rod came off the machine (444a), even though the machine had still not reached normal operation when Essex abandoned its efforts in May 1968. Essex witnesses testified that: "Running in just means pushing the button, make sure all the equipment is aligned, and that everything works properly" (339a), and: "Running in to me is the initial start-up" (443a).

Judge Motley did not credit this testimony. And her ruling is surely reasonable. For the Essex interpretation of "running in" is at odds with standard dictionary definitions of the term, the parties' own formulation of their respective responsibilities, agreed upon in early 1968, Essex's conduct in paying the bills for maintenance through May 1968, and plain common sense.

The dictionary definitions appear in the record at 332a-333a.

The parties clearly agreed upon the meaning of "running in". For in January 1968, Essex and Amax representatives met to define the conditions under which maintenance and operating responsibility would shift from Essex to Amax: on January 22, following these meetings, Essex's Dunstan wrote to Kaufmann of Amax that Essex was prepared to agree that "the Properzi will be considered operating normal beyond the original run in period and become the operating responsibility of Amax" when, among other conditions, the machine had operated for two weeks at an average production of 12,600 pounds per operating hour, and it had produced in those two weeks at least 750,000 pounds of acceptable rod (13E-14E). On February 8, Kaufmann replied that Amax would accept this definition (17E).

At the trial Dunstan, testifying for Essex, confirmed that this agreement made it Essex's responsibility to run in the machine until it was operating normally:

> "Q. Your understanding was that the Properzi would be considered to be operating normally, the original running in period would be regarded as at an end, and AMAX would become responsible for operations when, among other conditions, an hourly operating rate of 12,600 pounds had been achieved, is that right?

"A. Yes." (376a.)

Thus the parties agreed on the meaning of "running in."

Furthermore, Essex evidenced its agreement that day-to-day maintenance of the Properzi at Intalco was an Essex responsibility through May 1968 by paying bill after bill containing charges for direct maintenance and general maintenance which Amax submitted. Essex grumbled about the amount charged for maintenance services, but it did pay (147E-154E).* The charges it refused to pay, withheld from its remittances, and ultimately compromised at a meeting on July 25, 1968, were those for "fixed costs," i.e., general costs in the nature of rent allocated to the Properzi project, defined at trial by Dunstan as "costs they would have had had we not been there with the Properzi" (346a; 14E, 254E, 172E).

Further, there is the teaching of common sense: it made sense for Essex to have the responsibility for

---

* In its brief at pages 40-41, Essex seems to say that it never paid any bills for maintenance costs tendered by Amax, but its citations to the record offer no support. We invite the Court's attention to the invoices at 147E, 148E, 150E and 151E which include charges for direct maintenance and general maintenance. As the notations on the invoices make clear, Essex paid the maintenance charges but withheld payment of the charges for "fixed costs."

bringing the Properzi to the point of normal operation, for it was Essex and its project manager Kilburn who had prior experience with the installation and operation of Properzis. It was Essex, not Amax, that owned the machine, had a second on order from Italy, and was in privity of contract with Continuus and Nichols. Essex could require the presence of the Continuus and Nichols people to discuss design modifications. Essex could pressure Continuus and Nichols to speed up delivery of the blueprints, drawings, equipment lists and spare parts which Amax had to have if it was to provide day-to-day maintenance for the machine. And, if all else failed, Essex could sue Continuus and Nichols on their warranties.

Nothing is more reasonable than Judge Motley's observation to defense counsel during summation (Tr. 806-07): "I have very great difficulty with the concept of a machine that is, under your [Essex] definition, run in but not running normally. What good is such a machine to anybody?"

Finally, Essex's contention has the hollow ring of afterthought. If Essex really believed that Amax was

in breach, it would have given that reason for its decision to remove the machine. It might even have charged Amax with breach earlier -- perhaps giving Amax an opportunity to remedy any problems.

But Essex chose then to sing another song, to claim that the problem was with the Properzi. Its now-changed tune was quite reasonably rejected by the court below.

II

THE COURT CORRECTLY FOUND THAT AMAX PROVED ITS DAMAGES IN THE AMOUNT OF $4.1 MILLION BY CREDIBLE AND RATIONAL EVIDENCE.

A. Amax's lost prospective profits are the proper measure of damages for Essex's breach.

Defendant apparently does not challenge Judge Motley's ruling that the measure of damages here is to be determined under New York law and is Amax's lost profits -- the difference between Amax's cost of making rod and the contract price for the rod, less any profit Amax might make from sale, in the standard form of T-ingot, of the primary aluminum it otherwise would have used to make rod.

As a matter of analysis, we may note that Essex's removal of the Properzi in breach of the lease agreement put it beyond Amax's power to make the Properzi rod it had contracted to sell to its customers Okonite and Essex. Essex's simultaneous repudiation of the supply contract also prevented Amax from selling rod to Essex. The measure of damages for breach of the lease agreement is a matter of New York common law, and the

measure of damages for breach of the supply contract is governed by Section 2-708(2) of New York's Uniform Commercial Code. The parties seemingly agree, however, that the applicable principles are essentially the same under statute and common law: Where the buyer's breach of contract has prevented performance by the seller, the seller's damages are its lost profits, measured by the difference between the contract price and the cost of performance, less any profit realized on a sale of the materials on hand. See generally 5 Williston, Contracts §1379 (rev. ed. 1937); U.C.C. §2-708(2); Masterton v. Mayor of Brooklyn, 7 Hill 61, 42 Am. Dec. 38 (N.Y. 1845); Todd v. Gamble, 148 N.Y. 382, 42 N.E. 982 (1896); Hinckley v. Pittsburgh Bessemer Steel Co., 121 U.S. 264, 275 (1887).

Lost profits have always been an element of recoverable damages for breach of contract, provided only that it was within the contemplation of the parties when the contract was made that such a loss would result from a breach, and also that the lost profits are shown with reasonable certainty. As the New York Court of Appeals held in Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 210, 4 N.E. 264, 266 (1886):

> "Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of a breach of contract is not to be deprived of a remedy."

Essex's basic legal attack on the damages awarded below would treat this case as one of the rare situations where recovery is denied for lost profits anticipated from a "new venture" because the very existence of such profits is too uncertain and speculative. Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 119 N.E. 227 (1918), was such a case. Plaintiffs, who had little or no experience in selling retail clothing, planned to open a women's furnishings shop in a town where neither of them had before engaged in business. Because defendant failed to deliver the furniture and fixtures ordered, plaintiffs were unable to open their store in time for the fall and winter season. The Court of Appeals held it was error in these circumstances to award damages for the loss of anticipated profits:

> "No doubt the plaintiffs entertained hope that the business venture upon which they were about to embark would prove successful . . . . Plaintiffs, however, had no assurance that the venture would not prove

> to be a failure. At the time the contract was made they had the lease of a vacant unfinished store. They had not as yet purchased goods, placed goods on sale or secured one customer. They had before them the labor of building up a new business." Id. at 67-68, 119 N.E. at 228.

Essex suggests that the Properzi project at Intalco was a "new venture" akin to Grand Rapids Show Case Co. We disagree, as did the court below (145a).

Properzi continuous casting machines had been in operation in the United States for years, producing up to 9,000 pounds of rod an hour. The Model 8 was but the latest model, capable of producing 14,000 pounds per hour -- and, at the time of Essex's breach, two other aluminum companies were operating Model 8's at that level. The Intalco Properzi was installed in a most propitious location -- under the roof of the largest and most modern aluminum reduction plant in the country, the source of supply of molten metal for the machine. The Properzi crew at Intalco was being trained by Essex supervisors who had had years of prior experience in operating Properzis. Finally, Amax had two certain customers, Essex and Okonite, committed by contract to purchase millions of pounds of rod over the succeeding six years at a sure profit to Amax --

since the contract price of the rod was at a fixed premium over the published book price of ingot, itself an optimistic quotation representing "a market which the producers would like to adhere to" (502a).

In these circumstances, Amax's loss of profits is the proper measure of damages, even though the Properzi project was for Amax a "new venture." As Judge Weinfeld wrote in For Children, Inc. v. Graphics International, Inc., 352 F.Supp. 1280, 1284-85 (S.D.N.Y. 1972):

> "In the circumstances of this case the court is of the view that the loss of prospective profits, the direct and proximate result of the breach, should be the measure of damages. While it is true that plaintiff's enterprise was a new venture and that as a general rule loss of profits in the interruption of such a venture, in distinction to an existing and going business, is not allowed, there is evidence in this case upon which such an award can be made; moreover, such a measure of damages is less uncertain and conjectural than other proposed yardsticks of damage."

Judge Weinfeld continues, in a footnote:

> "Courts have often recognized that if profits were in the contemplation of the parties and there is shown some rational basis for determining such profits, they may be recovered as damages . . . [citing cases]. In the case at bar, profits derived

> from sale of the books were within the contemplation of the parties . . . . In addition, as already found by the court, plaintiff was fully relying upon defendant's expertise in the pop-up field." Ibid., n. 16. (Emphasis added.)

B. Amax's lost profits were properly ascertained as of the time of the breach in May 1968.

At trial, Amax proved through its witnesses Clough and Briggs that Amax's damages caused by Essex's wrongful removal of the Properzi amounted to $4,090,140, that being the difference -- reasonably foreseeable as of the date of breach, May 1968 -- between $17,418,240, the profit Amax would make from selling Properzi rod to its contract customers Essex and Okonite, and $13,328,100, the profit Amax would make by selling the same amount of aluminum in the form of T-ingot (156E, 181a-186a, 494a-495a, 228a-239a).

The three elements of this damages computation -- contract price, cost of making Properzi rod, and profit from the sale of T-ingot -- were all ascertained "with the particularity appropriate to any future event," Judge Motley wrote (145a), as of the date of Essex's

breach in May 1968. There was testimony from Briggs, based on regularly maintained business records, as to Amax's cost for primary aluminum and Properzi operation (228a-239a). Clough testified, also as of the date of breach, as to Amax's profit margin on sale of T-ingot (181a-186a, 156E).

Now, on this appeal, Essex comes up with a contention which it did no more than hint at while the trial was going on. It contends that Amax should have presented evidence not as of the date of breach but for the entire damages period 1968-73. We should have proven, says Essex, what our actual cost of primary aluminum was, week by week, month by month, or whatever. We should have proven what changes there would have been in the cost of operating the Properzi -- by reason of changed labor and raw material costs. Interestingly, Essex does <u>not</u> say that we should have proven the variations in our contract prices with Essex and Okonite which would have resulted from changes in the quoted book price of ingot to which our contract prices were pegged. Perhaps Essex's omission to complain is based upon the regular upward trend of quoted book prices (265E) -- which would probably increase the damages figure.

In any event, the short answer to this Essex contention is that it comes a little late. In this era of full discovery, Essex had available to it all information needed to prove our actual costs of primary aluminum, and our costs for labor and raw materials for the Properzi -- and it could have laid these alongside the contract prices. Essex's failure to offer this proof suggests, we submit, a recognition either that it would have made no difference or would have been to Essex's disadvantage. Significantly, Essex did not object to our proof of May 1968 costs and profit margins with any suggestion that they were irrelevant.

Perhaps most importantly, the law has been conclusively settled in New York for over a century that damages for breach of an executory contract are to be ascertained according to the circumstances existing at the time the cause of action arose. In Masterton v. Mayor of Brooklyn, 7 Hill 61, 42 Am.Dec. 38 (N.Y. 1845), Chief Justice Nelson (later Justice of the Supreme Court of the United States) wrote:

> "Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance." Id. at 68, 42 Am.Dec. at 44.

Justice Bronson said, concurring:

> "There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed . . . . I concur in opinion with the Chief Justice that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule: it will best preserve the analogies of the law; and will be as likely as any other to do substantial justice to both parties." Id. at 76-77, 42 Am.Dec. at 48.

Courts in other jurisdictions which have adopted the Masterton rule stress its simplicity and fairness: The Supreme Court of North Carolina said of the Masterton rule, in Hawk v. Pine Lumber Co., 149 N.C. 10, 11, 62 S.E. 752, 754 (1908):

> "We again commend its wisdom, as it fixes a sure standard for assessing the damages, and prevents a jury from entering into the field of uncontrolled conjecture and speculation, which might result in many cases most disastrously to the offending party. He surely should not complain of it, and his adversary has no ground for criticism of it as a proper criterion of what he should receive, as he gets, under it, all that he could have contemplated that he would receive, and he also receives a benefit from the fact that we exclude from the consideration of the jury vague surmise and conjecture as to what the future market, with respect to the cost of labor and material, and other elements of damages, will actually be. The fact that the market will fluctuate, and that prices will rise or fall, may be considered in estimating the damages, but not any particular or actual change which may have oc-

> curred in future conditions. The presumption is that he estimated his profit upon the basis of the conditions existing at the time of the breach, if there should be one, or that is at least as close an approximation as we can possibly make, with reference to what was in the minds of the parties and within their reasonable expectation, when they made the contract."

Among the decisions from other jurisdictions holding that damages for breach of an executory contract are to be determined as of the date of breach are J.D. Hedin Construction Co. v. F.S. Bowen Electric Co., 273 F.2d 511 (D.C. Cir. 1960); Peter Kiewit Sons' Co. v. Summit Construction Co., 422 F.2d 242 (8th Cir. 1969); Haddad v. Western Contracting Co., 76 F.Supp. 987 (N.D.W.Va. 1948); and Carras v. Birge, 211 S.W.2d 998 (Tex.Civ.App. 1948).

Essex argues, however, that when there is an anticipatory breach of contract (as was the case in its repudiation of the supply contract, though not in its repudiation of the lease agreement), damages are to be computed as of the date fixed for performance, not as of the date of the repudiation, 5 Corbin, Contracts § 1053, at 310-12 (1964). The rationale for that rule, explained by Judge Swan in In re Marshall's Garage, 63 F.2d 759

(2d Cir. 1933), is that repudiation does not accelerate the time fixed for performance. Therefore, if the breach of contract action reaches trial before the date fixed for performance, the plaintiff will not be awarded a pre-payment windfall, but only the present value of the performance due at that future date. In the Marshall's Garage case, an action for breach of a contract to convey land, the time fixed for conveyance was 1936, the date of repudiation (by involuntary bankruptcy) was January 1930, and the case reached trial in 1930. The court accepted the proved value of the land in January 1930 as the best prediction possible at time of trial about what the value of the land would be in 1936, and it awarded the present discounted value of that amount as damages.

That anticipatory repudiation rule might apply to computation of damages occasioned by Essex's breach of the supply contract* if there had been a date or dates fixed in the supply contract for delivery of rod to Essex, and if this case had reached trial before such

---

* Of course, it was Essex's breach of the bailment lease agreement by removing the Properzi from Intalco that made it impossible for Amax to produce rod for sale to Essex and Okonite, and therefore all of Amax's lost profits are directly traceable to breach of the lease agreement.

date or dates. Neither condition exists here. For there is a well-recognized exception to this anticipatory repudiation rule, and this case fits the exception precisely: When time for delivery of goods under an executory contract of sale is indefinite or not fixed, it is impossible to compute damages based on the difference between the contract price and the market value or cost of performance on some indefinite "date of performance." In such circumstances, the time for delivery will be assumed to be the time when the buyer definitely repudiates or renounces the contract, or wrongfully refuses to accept the goods, since the refusal to receive the goods implies a refusal to fix a time for their delivery. McJunkin Corp. v. North Carolina Natural Gas Corp., 300 F.2d 794 (4th Cir. 1961), cert. denied, 371 U.S. 830 (1962); 67 Am. Jur.2d, Sales § 644 (1973). No dates were fixed in the supply contract for Amax to ship Properzi rod to Essex -- the contract calls only for certain minimum amounts to be delivered during the course of each year. In consequence, no date of performance is determinable for the measurement of damages. This is no hypothetical problem -- raw material costs vary constantly through time, of course, and the quoted book price of T-ingot, to which Amax's price for rod was pegged, varied monthly (265E).

In the circumstances of this case, moreover, it is peculiarly appropriate to measure damages as of the date of Essex's breach:

First, it was Essex that made it impossible for Amax to have any 1968-1973 experience in the actual cost of making Properzi rod, because Essex wrongfully removed the Properzi from Intalco in 1968. If Essex is responsible for any difficulty of proof, it should not be permitted to profit by it.

Second, Essex's suggestion that damages be measured through time has quite significant conjectural elements: Essex argues that, in mitigation of damages, Amax should have subtracted the actual profits it made from 1968 to 1973 by selling as T-ingot the 225,900,000 pounds of aluminum which it would have sold to Essex and Okonite as rod. But Intalco produces 260 million pounds of aluminum per year for Amax's account (158a). Of the 1,560 million pounds of T-ingot that Amax sold at varying prices over the six-year period, how can we determine the 226 million pounds from the cancelled Essex and Okonite contracts? And what were the actual profits on those particular sales? Essex's attempt to calculate these

T-ingot profits is based on two inaccurate assumptions -- that T-ingot book price accurately reflects T-ingot selling price, when the record reveals that it does not (50a); and that Amax's average annual cost per pound of aluminum sold accurately reflects the actual cost of the particular 226 million pounds diverted from the cancelled supply contracts -- when we have no way of knowing which 226 million pounds we are dealing with.

There is no warrant, then, for measuring damages even as to lost sales to Essex other than as of the date of breach -- the date which the court below used.

We may perhaps note the essential fairness of measuring damages as of the date of breach; it insures that neither party receives a windfall, whether the buyer or the seller be the breaching party. As to breach by a buyer: if the cost-price margin widens through time, the seller may not collect the unexpected gap from the buyer; and if the gap narrows, the buyer is not saved the unexpected benefits of his misconduct. Conversely, where the seller is in breach: where the gap narrows, he does not experience an unforeseen saving, and where it widens he suffers no unexpected burden.

The law of contracts exists, it has often been observed, to protect people in their reasonable expectations. That is what Judge Motley did here.

C. Amax's costs were reasonably proven.

Finally, Essex takes issue with our proof of the most complex element of the damages calculation -- how much it would have cost Amax to make the Properzi rod that Essex prevented it from making and selling. The court below expressly found our proof to be credible and rational, writing:

> "At trial, Amax offered proof of its lost profits in the form of testimony and documentary evidence. In particular, the testimony of Thorley D. Briggs, vice-president of Intalco, presented a credible and rational basis from which prospective profits could be gauged. The various claimed costs (e.g., molten metal, machine, labor, power, gas and water) have been explained to the court's satisfaction. This is so despite Essex's efforts at trial to draw into question the cost-accounting evidence advanced by Amax" (146a-147a).

Briggs, the Intalco vice-president responsible for administrative and financial operations, has had twenty years of manufacturing costing experience in the steel, chemical and aluminum industries (226a-227a). He

is the man at Intalco who developed the product costing system used to bill Intalco's two owners for the various forms of aluminum produced for them (227a-228a). The costing system Briggs uses at Intalco is the machine hour rate system, based on generally accepted cost accounting procedures and commonly used to cost variable product and production equipment in the aluminum industry (229a-230a).

When Amax and Essex were considering possible purchase of the Properzi by Amax, in May 1968, Briggs prepared for Amax's Clough an analysis of Properzi rod production costs, Exhibit D-30 (180E-182E). He prepared it in the same way he costs every product, from simple T-ingot to the most complex alloy extrusion. Some cost elements are standard, not varying from product to product: For example, the cost of the primary aluminum used in a pound of T-ingot is the same as that used in a pound of Properzi rod; and shipping costs, dross recovery costs, rent and plant allocation costs are the same for each pound of product, regardless of its form or metallurgy (229a, 236a-237a). Other cost elements -- alloying ingredient cost and machine cost -- will vary according to the product

(229a). Calculation of machine cost per pound of product is perhaps the most involved computation, but it consists, in essence, of figuring the cost per hour of running the machine needed for production of the particular form of aluminum, in accordance with well established cost allocation procedures, and then dividing that hourly cost by the number of pounds of product the machine produces in an hour. The component parts of machine cost include the wages, overtime and payroll benefits of the employees needed to run the machine, as well as cost of utilities, operating supplies, and maintenance services needed for the machine, and an appropriate allocation of cast house direct costs (182E). The only remaining component of machine cost would be the cost of depreciation (181E).

At trial, Briggs used this analysis he had prepared in May 1968 as the basis for his testimony as the cost of producing Properzi rod at Intalco at that time. The memorandum was no "guesstimate," but a carefully prepared summary accurately reflecting cost data regularly compiled and applied at Intalco to cost every pound of product made there (229a-238a).

Essex complains that Amax's cost of producing rod was not proved with "competent business records," but Exhibit D-30 is clearly admissible into evidence under Rule 803(6) of the Federal Rules of Evidence as a record of regularly conducted activity. As stated in 4 Wigmore, Evidence §1230, at 535 (Chadbourn rev. 1972):

> "Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements . . . it is obvious that it would often be practically out of the question . . . [to require] the production of the entire mass of documents . . . . The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who . . . will state summarily the net result."

And the memorandum's reliability is assured by the circumstances of its preparation: to guide Amax officials in their decision as to possible purchase of the Properzi.

The net result of Briggs' cost accounting in May 1968 and his testimony at trial in 1974 was to prove, to Judge Motley's satisfaction, that the cost of producing a pound of Properzi rod at Intalco in May 1968 under normal operating conditions would have been 17.0 cents, 15.8 cents of which was the cost of the molten metal (147a).

Essex complains that Amax's cost of producing rod was not proved with "competent business records," but Exhibit D-30 is clearly admissible into evidence under Rule 803(6) of the Federal Rules of Evidence as a record of regularly conducted activity. As stated in 4 Wigmore, Evidence §1230, at 535 (Chadbourn rev. 1972):

> "Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements . . . it is obvious that it would often be practically out of the question . . . [to require] the production of the entire mass of documents . . . . The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who . . . will state summarily the net result."

And the memorandum's reliability is assured by the circumstances of its preparation: to guide Amax officials in their decision as to possible purchase of the Properzi.

The net result of Briggs' cost accounting in May 1968 and his testimony at trial in 1974 was to prove, to Judge Motley's satisfaction, that the cost of producing a pound of Properzi rod at Intalco in May 1968 under normal operating conditions would have been 17.0 cents, 15.8 cents of which was the cost of the molten metal (147a).

Essex objects to the accuracy of that 17.0 cent figure on two grounds: First, it speculates, Intalco's costs may not have been Amax's costs, and perhaps there should be added to the 17.0 cent cost figure some amount representing a possible profit to Intalco, and some amount representing Amax's administrative expenses in dealing with Essex during the period preceding termination of the Properzi contracts. Second, it notes that the 1.2 cent spread between the cost per pound of Properzi rod and the cost of the molten metal used in the rod represents Briggs' estimate of the cost of converting molten metal to Properzi rod; and it charges that that conversion cost must be wrong because higher conversion costs were incurred during the Properzi start-up periods at Intalco and Boonville, and because Alcoa would have charged Essex 3 cents per pound to convert molten metal to Properzi rod. Neither objection has any merit.

In the first place, there is no evidence at all in the record of this case to indicate anything else but

that Intalco's costs are Amax's costs.* Amax and Howmet each own 50 per cent of the Intalco reduction plant (162a), and Intalco produces aluminum only for its owners (238a). If Intalco adds some profit mark-on to its billings (a matter about which the record is completely silent), then the owners must recoup those amounts by virtue of their equal participation in Intalco's profits.

Furthermore, if Intalco had added a profit mark-on to every pound of Properzi rod it produced for Amax, it

---

* In Appellant's Brief at pages 19-20, Essex completely misinterprets what Briggs testified about Intalco's billing a "premium over T-ingot" for the more complex aluminum products it makes for its owners. That "premium" is not a profit to Intalco, but rather the cost of the additional machine time and alloying ingredients needed to make more complex aluminum products ("premium products") over the cost of making the same amount of molten metal into unalloyed T-ingot, the simplest aluminum product (238a). As Briggs testified (238a), and as Exhibit D-30 shows (180E), Intalco bills its owners a standard T-ingot cost for every pound of aluminum produced for them in any form, and in addition, if the aluminum is a "premium product" of more complicated form and metallurgy, Intalco will also bill a "premium over T-ingot" equal to the additional direct costs attributable to production of that premium product. In Exhibit D-30, Briggs lists all the cost components of producing a pound of Properzi rod, and adds a line called "premium over T-ingot" to show how much more it costs to make Properzi rod than it costs to make T-ingot. Thus Clough was able to subtract the "premium over T-ingot" figure from the total cost of making Properzi rod, and arrive at the cost of T-ingot in May 1968 -- 16.2 cents per pound. (185a, 180E).

Furthermore, if Intalco had added a profit mark-on to every pound of Properzi rod it produced for Amax, it would also have added a profit mark-on to every pound of T-ingot it produced for Amax after cancellation of the Properzi contracts. Therefore, in calculating the difference between Amax's anticipated profits on rod sales and Amax's actual profits on T-ingot sales, the profit mark-ons would wash out, and the lost profits calculation would be precisely the same as that presented at trial.

The record is equally silent about the amount of any administrative expenses Amax may have incurred at its home office in negotiating with Essex about the Properzi agreements. This is clearly the kind of start-up cost that is absorbed by the parties to the contract, and not made part of the costs of their joint venture. And, as in the case of the wash of profits, any administrative costs that Amax might have incurred in servicing its supply contracts with Essex and Okonite are clearly washed out by the administrative costs Amax did actually incur in reselling that much aluminum to other customers in the form of T-ingot.

Essex's second objection is scarcely worthy of comment: The Intalco and Boonville start-up costs are obviously not comparable to the costs of producing rod on a Properzi which is operating normally right next to the source of its supply of molten metal. The parties themselves recognized this fact by entering into a special billing arrangement for the rod produced at Intalco during the start-up period and shipped to Essex. Neither can Briggs' 1.2 cent conversion cost be compared to the 3.0 cent conversion price Alcoa would have charged Essex for the production of Properzi rod: Alcoa's tolling charge clearly included a good profit for Alcoa, and there is no indication that Essex ever availed itself of the service, obviously because it was cheaper for Essex to produce rod for itself on the Properzi it reinstalled at Boonville.

There is, then, not the slightest reason to disturb Judge Motley's findings as to production costs and lost profits.

III

THE COURT CORRECTLY HELD THAT AMAX IS ENTITLED TO JUDGMENT FOR $424,898.95 ON THE SETTLEMENT AGREEMENT OF JULY 25, 1968.

On July 25, 1968, Essex and Amax settled a dispute about the $452,738.95 balance unpaid of Amax's total billings to Essex for Properzi rod shipped to Essex during the start-up period: Amax agreed to reduce the amount owing by $27,840, and accept $424,898.95 to end the argument about "fixed costs" (169a-171a, 25E, 143E, 178E).

The court below found that this agreement was a compromise of the outstanding billing dispute between the parties, and not a settlement of the larger controversy about Essex's breach of the Properzi agreements (141a-142a) -- a contention Essex made below but abandons here.

The court held, therefore, that, in addition to its lost profits, Amax is entitled to $424,898.95 (148a).

CONCLUSION

We ask that the judgment appealed from be affirmed in its entirety.

April 18, 1975

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Plaintiff-Appellee

Jay H. Topkis
Doris Carroll

Of Counsel